

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of
E.J.MCGAH TRUST, GUS J. SOUZA, TRUSTEE

For Appellant: Albert B. Chan
Attorney at Law

For Respondent: Crawford H. Thomas
Chief Counsel

Lawrence C. Counts
Assistant Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of E. J. McGah Trust, Gus J. Souza, Trustee, against proposed assessments of additional personal income tax in the amounts of \$149.00 and \$187.24 for the years ended February 28, 1963, and February 29, 1964, respectively.

The question presented by this appeal is whether the trust instrument hereafter described created a single trust or two separate trusts,

In 1961 E. J. McGah executed a trust instrument, the pertinent terms of which are as follows:

* * *

... The name of this trust shall be:
Hermosa Trust.

* * *

The trust estate is given to the trustees for the following purposes:

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(a) The same shall be divided into two equal shares and one share- shall be held in trust for Lawrence Hunt Combs, Jr . and the other for Laurie Jeanne Combs.

(b) The income from each share shall be accumulated for the beneficiary thereof until said beneficiary attains- the age of twenty- one years .

(c) As each beneficiary attains the age of twenty-one years, he or she shall be paid a sum of one-fourth of his or her s'hares of the trust estate not to exceed Two Thousand (\$2,000.00) Dollars. Commencing with the first month after the attaining of the age of twenty-one, beneficiary shall be paid from his or her share the sum of One Hundred (\$100.00) Dollars per month until said beneficiary shall receive one-fourth of his or her trust estate, or Two Thousand (\$2,000.00) Dollars, whichever is less. At age thirty, beneficiary shall receive one-fourth of the trust estate of Five Thousand (\$5,000.00) Dollars, whichever is less and shall thereafter receive monthly the sum of Four Hundred (\$400.00) Dollars, until age forty, at which time the principal and accumulated income of each share shall be paid to the beneficiary thereof, and this trust shall cease and terminate as to such beneficiary.

(d) In the event that either of said beneficiaries herein named dies before reaching the age of forty, his or her share shall be paid to his or her natural issue in the same manner that the beneficiary named would have received payment. In the event that either of said beneficiaries herein named dies before reaching the age of forty, leaving no issue, child or children, then her or his share shall be added to the share of the surviving beneficiary hereunder. In the event that both of the beneficiaries herein named shall die before attaining the age of forty years and leaving no issue, child or children, then the principal or accumulated income of all trust funds shall be paid to Norma J. Combs, and should she be deceased, then to Et. Vincent's Catholic Church, Vallejo, California.

* * *

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Other portions of the trust instrument contain numerous references to the entire arrangement as "this trust."

For the year ended February 28, 1962, the trustee filed a single return for the "Hermosa Trust." For each of the years on appeal, the years ended February 28, 1963, and February 27, 1964, the trustee filed a return designated "Hermosa Trust for Laurie Combs" and a return designated "Hermosa Trust for Lawrence Combs, Jr. " A trust exemption was claimed on each return for the years on appeal and the trust income was evenly divided on each of those returns.

Respondent determined that the trust instrument created but one trust and, based on that determination, issued the proposed assessments that are now in question. Appellant protested and filed an affidavit of E. J. McGah, the trustor, in which the trustor stated that he had intended to create two separate trusts. After further consideration, respondent denied the protests and this appeal followed.

The question of whether a trustor has created one trust or more than one trust depends primarily on the expressions of his intention in the trust instrument. (dells Fargo Bank, etc., Co., v. Superior Court, 32 Cal. 2d 1 [193 P.2d 721]; Huntington National Bank v. Commissioner, 70 F.2d 876,) If the terms of the trust instrument indicate that one trust was created, testimony by the trustor that he actually intended to create more than one trust must be disregarded.. (McKinley v. Commissioner, 80 F.2d 672.)

Where, as in the case before us, the trustor consistently refers to his creation in the trust instrument as a single "trust" rather than as several "trusts" there must be a clear showing to support a finding that he actually created more than one trust. (Hale v. Dominion National Bank, 186 F.2d 374, cert. denied, 342 U.S. 821 [96 L.Ed. 621]; Huntington National Bank v. Commissioner, 70 F.2d 876; Fort Worth National Bank v. United States, 137 F. Supp. 71; Edward M. and Fred C. Hiecke Trust, 6 T.C. 30.)

The separation of a trust into "shares" does not in itself demonstrate that separate trusts are created, (Hale v. Dominion National Bank, supra.) Separate trusts may exist, however, where each "share" during the whole period of its existence in trust is as completely isolated from all the other "shares" in composition, in beneficiary, and in duration, as though they had all been set up by separate deeds. (McHarg v. Fitzpatrick, 210 F.2d 772.) Conversely, a single trust is indicated if the shares are not completely isolated and independent.

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in Fort Worth National Bank v. United States, supra, 137 F.Supp. 71, the court found that the shares designated in a trust instrument were not isolated and independent and that a single trust was indicated where a surviving beneficiary could receive in trust a part of the share of a beneficiary who predeceased him. Under the terms of the trust instrument before us, if a beneficiary should die without issue before reaching the age of 40, his share is to be added to the share of the surviving beneficiary. As in the Fort Worth case, therefore, a single trust is indicated.

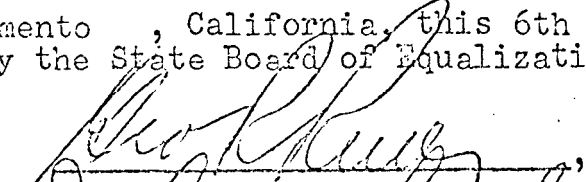
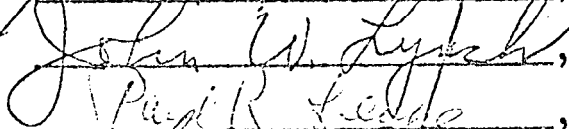
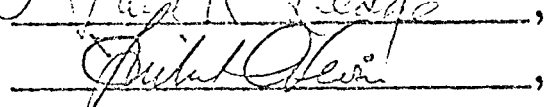
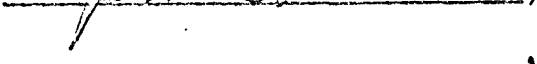
Since the trust instrument in *question* expresses an intent to create one trust and that expression of intent is not rebutted by other provisions of the instrument, we conclude that only one trust resulted. Respondent's action, accordingly, must be sustained.

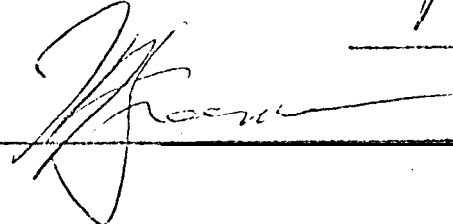
ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code that the action of the Franchise Tax Board on the protests of E. J. McGah Trust, Gus J. Souza, Trustee, against proposed assessments of additional personal income tax in the amounts of \$149.00 and \$187.24 for the years ended February 28, 1963, and February 29, 1964, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of October, 1966, by the State Board of Equalization.

 _____, Chairman
 _____, Member
 _____, Member
 _____, Member

ATTEST:  _____, Secretary